



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

SUPREME COURT OF APPEALS OF VIRGINIA.

WICKHAM *et al.* v. RICHMOND STANDARD STEEL SPIKE & IRON CO.

June 13, 1907.

[57 S. E. 647.]

1. **Landlord and Tenant—Rent—Definition.**—Where land adjoining lessors' canal was leased as a mill site, together with sufficient water from the canal to operate the mill, at an aggregate annual rental of \$2,300, \$275 being apportioned to the land and \$2,025 to water, the stipulated compensation for the use of water constituted rent, and hence was collectible by distress.

2. **Same—Distress—Abandonment of Levy—Effect on Second Levy.**—The abandonment of one levy under a distress warrant did not bar a second levy for the same rent, where the arrearages distrained for were due, and under the first warrant the property levied on, though advertised for sale, was not removed from the premises; the first levy being abandoned because the warrant was issued for more than one year's rent, and the lessors, discovering the property was mortgaged, deemed it more regular to distrain for one year's rent only.

Error to Law and Equity Court of City of Richmond.

Action by the Richmond Standard Steel Spike & Iron Company against H. T. Wickham and another, receivers. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Eppa Hunton, Jr., and *H. Taylor, Jr.*, for plaintiffs in error.
Wm. L. Royall, for defendant in error.

WHITTLE, J. The object of this action is to recover damages from the plaintiffs in error for the alleged illegal levy of a distress for rent upon the property of the plaintiff.

The lessors, who were predecessors in title of the defendants, demised to the lessee, through whom the plaintiff claims, a lot or boundary of land in the city of Manchester, adjoining their canal, for a mill site, together with sufficient water from the canal to operate the mill and machinery which the lessee was to erect and install upon the premises. The lease was for the term of 25 years, at an aggregate annual rental of \$2,300, of which sum \$275 was apportioned to the land and \$2,025 to water. In the year 1905 the arrearage of the plaintiff under the lease amounted to \$2,978.96, whereupon the defendants caused a distress warrant to be levied upon the property of the plaintiff on the premises for the amount due. The articles levied on were

advertised for sale, but were not sold or removed; and it appearing that the property was subject to mortgage, as against which, by statute, it was not liable for more than one year's rent, the levy was released and the warrant dismissed. Subsequently another warrant was issued for one year's rent and levied on substantially the same property, which was sold, and upon that proceeding this action is founded. To an adverse verdict and judgment the defendants bring error.

The dominant contentions in the case, both of which were resolved in the plaintiff's favor, are: (1) That the stipulated compensation for the use of water does not constitute rent, and therefore was not collectible by distress; and (2) that the abandonment of the first levy was a bar to the second.

With regard to the first proposition it may be remarked that it is not possible to read the agreement of the parties as a whole without being sensible that it was their intention to treat the return for both land and water as rent. Though the consideration for the use of the land and water; respectively, are embodied in separate clauses of the same instrument, the lease was for a special purpose, which would have been wholly defeated by the failure of either element of the consideration. Each forms an indispensable part of the whole, the substance of the subject-matter of the contract, and they are consequently not severable. *Rogers v. Pattie*, 96 Va. 501, 31 S. E. 897. The spike mill and machinery, destitute of water to operate them, would have been as valueless as a water grist mill under like conditions.

Unquestionably the rental for land may be immeasurably increased by the presence of personal property upon it, the consideration for the enjoyment of which may be included in the lease. In such case, the return from the use of both properties is considered to be rent, upon the assumption that the entire rent issues out of the land, while the benefit of the personalty is an incident which enhances its value.

In *Mickle v. Miles*, 31 Pa. 20, the court said: "The ordinary definition of a rent as a profit issuing yearly out of lands and tenements corporeal is defective in overlooking some of the cases that belong to the class, as where a furnished house or stocked farm is leased, which are common cases. 5 Bos. & P. 224; 5 Co. 16b; Sean, 42. In such cases the personal property is really a part of the consideration of the rent, and it is only by a fictitious accommodation of the case to the defective definition that it can be said that the rent issues exclusively out of the land."

So in *Fernwood Masonic Hall Ass'n v. Jones*, 102 Pa. 307, where the lessee covenanted to pay the lessor for all gas consumed on the premises, it was held that arrearages for gas were rent and might be distrained for. In that case it was said that the stipulations for the rent of the building and to pay for the

gas were in immediate connection, and the covenant to pay for the gas was as much a part of the rent as would have been a covenant to pay taxes on the premises during the term.

In *Sutliff v. Atwood*, 15 Ohio St. 186, where the lease was of a dairy farm with stock upon it, and in *Baldwin v. Walker*, 21 Conn. 168, the lease of a factory and fixtures, it was held that the consideration received for both properties was to be regarded as rent. See, also, 18 Am. & Eng. Ency. L. 260, note 2.

To the same effect are the decisions in this state.

Thus in *Newton v. Wilson*, 3 Hen. & M. 470, where "a lease was made of a mill, together with a tract of land adjoining and a black man as miller, for a term of years, rendering an annual rent, the miller had previously to the lease been emancipated by the lessor," and the lessee was allowed an abatement of rent.

In *Williams v. Howard*, 3 Munf. 277, it was said: "In a lease of a tract of land, with sundry slaves and other personal property, reserving, by way of rent, a gross sum payable annually, the remedy by distress may be resorted to, without any express stipulation."

So also, in the case of *Mickie v. Wood*, 5 Rand. 571, the principle is recognized that in a lease of land and personalty the consideration reserved does not lose its character of rent from the circumstance that personal property is embodied in the lease.

It is not necessary in this case to determine whether water lawfully withdrawn from a natural stream and conveyed into a permanent artificial channel and appropriated to useful purposes is *per se* demisable. However that may be, we are of opinion that the agreement in question comes fully within the influence of the doctrine announced by the authorities cited. The covenants in the lease for the mill site with sufficient water from the canal to operate it are interdependent covenants, and the mere fact that the parties have chosen to fix separate values upon the use of the land and water cannot dissociate the properties and destroy the mutual dependence of the connecting stipulations. The associated use of the properties constitutes the base upon which the enterprise which gave birth to the agreement rests. Both are indispensable to the success of the plan, and the withdrawal of either would defeat it. Consequently the covenants are not severable, but form a joint and indivisible consideration for the lease. It would be mere juggling with words to say that, if the lessors had reserved a rental of \$2,300 per annum for the mill site with the additional privilege to the lessee of withdrawing sufficient water from the canal to run the mill, the consideration would be rent, yet to hold that, though precisely the same result is attained by apportioning the consideration for the land and water, the sum reserved for water loses its character of rent, an attribute with which it is impressed by reason of its union with the land.

Under the principle of the cases referred to, the extent of the enhancement of value of the premises to the lessee from the use of the personalty is immaterial. It is the fact that the properties are inseparably blended together in the same lease and moved the parties to enter into the agreement that clothes the entire consideration with its character of rent.

It is not necessary to decide how far this court, in the beginning of the twentieth century, would adhere to the narrow definition of rent which obtained in the time of Lord Coke, that it only issued out of "things manurable" (Hargrave & Butler's Co. Litt. 44b); for, as we have seen, the case falls within the well-recognized exception to the common-law rule, namely, that personal chattels in union with and essential to the purposes for which the land is leased are demisable (1 Taylor's Landlord & Tenant [9th Ed.] § 18).

The remaining proposition, that the abandonment of one sufficient levy under a distress warrant for the same rent constitutes a bar to a second levy, is admittedly a correct statement of the general rule of the common law. At common law the landlord was his own executioner, "his own carver." The proceeding was the sole act of the landlord, and the tenant, who was at his mercy, was not liable to be twice vexed for the same rent. 1 Taylor's Landlord & Tenant (7th Ed.) § 733; *Bagge v. Mawby*, 8 Exch. 649; *Dawson v. Cropps*, 50 Eng. C. L. 961; *Sear v. Caldicott*, 45 Eng. C. L. 123; *Quinn v. Wallace*, 6 Whart. (Pa.) 452.

Altogether different conditions prevail at present with respect to distress warrants. The proceeding under the statute is judicial in its character, and the rights of the tenant are thoroughly safeguarded. Chapter 177, Code 1904. But even the strict rule of the common law was subject to the exception that for justifiable cause the landlord might abandon the first distress and distrain again for the same rent. *Everett v. Neff*, 28 Md. 176, 186; 24 Cyc. 1295; *Brooks v. Wilcox*, 11 Grat. 411.

In this instance there is no evidence of a wrongful distress wantonly made. The arrearages distrained for were confessedly due, and under the first warrant the property levied on, though advertised for sale, was not removed from the premises. The right of the lessors to distrain for the water rent was denied, and they were threatened with an action for damages if they resorted to that remedy. The first warrant was for more than one year's rent, and the lessors, discovering that the property was under a mortgage, were doubtless of opinion (perhaps erroneously) that it would be more regular to issue a warrant for one year's rent only. Code 1904, § 2791. The lessors would be liable for any injury that may have been occasioned by the levy of the first distress warrant; but it cannot, upon the facts of this case, constitute a bar to proceedings under the second warrant.

The rulings of trial court on these controlling questions render a new trial along other lines inevitable, and make it unnecessary to notice the remaining assignments of error.

For these reasons, the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

Note.

This case decides two very important propositions, and though the first point has been touched on in several early cases in this state, nothing seems to have been decided as to the second. The first proposition is that the definition that rent is a profit issuing yearly out of lands and tenements corporeal is too narrow, in that it overlooks such common cases as where a furnished house or stocked farm is rented. It was held that where a lease was of a mill-site and of sufficient water from a canal to operate the mill and machinery, the stipulated compensation for the use of the water constituted rent. There can be no question as to the correctness of this ruling; it settles the definition of rent in this state to be: A return or compensation issuing periodically out of lands and tenements corporeal, or out of lands and its furniture, in return for their use. The second proposition decided by the court is that under the Virginia Code an abandonment of one sufficient levy under a distress warrant is not a bar to a second levy. The court points out that the reason for the contrary rule which prevailed at common law was that "at the common law the landlord was his own executioner, 'his own carver.' The proceeding was the sole act of the landlord, and the tenant, who was at his mercy, was not liable to be twice vexed for the same rent." The court said "the proceeding under the statute is judicial in its character, and the rights of the tenant are thoroughly safeguarded."

WATTS *et al* v. NEWBERRY *et al*.

June 20, 1907.

[57 S. E. 657.]

1. Executors—Claims—Priority—Guardian De Son Tort.—A ward of a guardian de son tort was not entitled to priority of payment of his claim against such guardian out of the guardian's estate, under Code 1904, § 2660, providing that the assets of the decedent in the hands of his personal representative, if insufficient to satisfy all demands, should be applied, *inter alia*, to the payment of debts due as trustee for persons under disabilities or as guardian or committee, where the qualification was in Virginia.

2. Trusts—Tracing Trust Funds—Claims against Guardian.—Where a guardian de son tort received funds belonging to his ward, which he wrongfully mingled with his own property, so that it could not be clearly identified or distinctly traced into any property, chose in